1999

Rae Lyn Schwartz v. David Benzow : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

CASE NO. 990328-CA

RAE LYN SCHWARTZ,

Plaintiff and Appellant

vs.

DAVID BENZOW,

Defendant and Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL DISTRICT
IN AND FOR IRON COUNTY

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT RAE LYN SCHWARTZ

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I.

SCHWARTZ IS ENTITLED TO A NEW TRIAL BASED ON THE JURY'S VERDICT

A. Schwartz's Appeal of The Jury Verdict is Appropriate.

The completed jury verdict form was completely incomprehensible. In its brief, Benzow admits that the jury verdict form was so obviously inconsistent that the plaintiff's counsel should have objected immediately upon it being read aloud. (Appellee's Brief at 9-10). However obvious the verdict sheet was on its face, Schwartz's counsel did not have an opportunity to review the completed jury verdict form prior to the jury being dismissed. The jury was dismissed within seconds of the verdict being read. T. 375-376.

In addition, Benzow attempts to divert the Court's attention away from the obviously defective jury verdict. On the one hand, Benzow asserts that the jury's verdict was quite clear. But to do so, Benzow admittedly overlooks the jury's answers to questions number 2 and 4, which determined both parties proximately caused the accident. On the other hand, Benzow admits that the answers to these two questions "may be a bit unusual." Therefore, according to Benzow's position, the jury verdict form can only be understood if the answers to questions 2 and 4 are ignored. This approach is totally inappropriate. The entire jury verdict sheet must be read together, and it is clearly illogical.

B. The Jury Verdict Is Totally Inconsistent.

According to the second argument set forth by Benzow, the completed jury verdict sheet should be read backwards and by reading it that way, the jury verdict should be affirmed. (Appellee's Brief at 12-13). Benzow asks this Court to only examine the jury's response to question number 5 while reading it with the jury's negative response to question number 1. First, common sense and logic dictates that the jury sheet must be read in order. Renumbering questions after the jury has already rendered its verdict is completely inappropriate. Second, regardless of how one reads question number 5 and its answer of 50/50 allocation of fault, it cannot be reconciled with both of the jury's "no" answers with respect to each party's negligence. (Questions 1 and 3, respectively).

Furthermore, Benzow asks the Court to view the answers to questions 2, 3, and 4 as "surplusage, which do not affect the dispositive findings." (Appellee's Brief at 13). Based upon this approach, Benzow again argues the jury's intent was clear. Despite this contention, Benzow fails to explain how the jury could determine neither party was negligent, yet find both parties proximately caused the accident. Again, the completed jury verdict form must be read in whole, which clearly establishes a totally inconsistent finding.

II.

THE ADMISSION OF THE WITNESS' HEARSAY STATEMENTS WAS PREJUDICIAL ERROR

Benzow sets forth factual information regarding Officer

Bigler's qualifications in an effort to establish the Officer's credibility as a witness. This background information is irrelevant to the fact that the statements of Erica Wolfe and Carolyn constitute hearsay and should have been deemed inadmissible.

Benzow masks the main issue, which is the trial Court's error in allowing Bigler to testify regarding the hearsay statements. Benzow's argument on this issue misses the point. Benzow's argument is that the pubic records exception under Utah R. Evid. 803(8) somehow permits Officer Bigeler to testify to hearsay statements. The public records exception is not relevant to our case. The issue is not the admissibility of a record, but rather the admissibility of testimony from a witness. Pointedly, the police report which Benzow focuses on, was not even introduced as evidence at the trial.

Benzow refers to a second hearsay exception, Rule 803(1). This exception does not apply to the statements made by Erica Wolfe and Carolyn. Rule 803(1) permits statements "made while the declarant was perceiving the event or condition or immediately thereafter." Here, the statements were made well after the accident. Benzow incorrectly implies that Erica Wolfe's statements were given to Officer Bigler while she was laying on the road. (Appellee's Brief at 14-15 and T.251). Officer Bigler testified he also interviewed Ms. Wolfe at the hospital. T. 251. The record is silent as to when Ms. Wolfe made the statement to the police officer. Regardless of whether the statement was made at the

location of the accident or at the hospital, it was too remote in time to qualify under the Rule 803(1) hearsay exception.

The same would apply to the statement made by Carolyn, as she clearly spoke to Officer Bigler at the hospital. T. 253. Additionally, given the injuries sustained by both Erica and Carolyn, their statements to Officer Bigler are unreliable and should not have been admitted on that basis alone.

The admission of the hearsay statements into evidence through Officer Bigler's testimony was clearly prejudicial error and demands a reversal.

III.

THE JURY SHOULD HAVE BEEN INSTRUCTED REGARDING NO PASSING ZONES

Proposed jury instruction number 22, with respect to no passing zones, was presented to the Court in a timely fashion. The Court considered the jury instruction on its merits. Ultimately, the Court rejected this proposed jury instruction due to the fact that it would have required additional jury instructions and the Court found it duplicative of other instructions. T. 311-313.

Benzow argues that since several other jury instructions used at trial contain the duties of a motor vehicle operator no error was committed. However, none of these instructions contained any reference to motor vehicle statutes. In fact, jury instruction 19 indicates that "every driver is required to . . . pass others only after observing that it could be done safely." This instruction runs completely counter to the proposed jury instruction number 22,

which does not permit passing on a double yellow line. Therefore, the Court's failure to provide instruction number 22 prejudiced Schwartz and requires a reversal.

CONCLUSION

For the foregoing reasons, Schwartz is entitled to a new trial.

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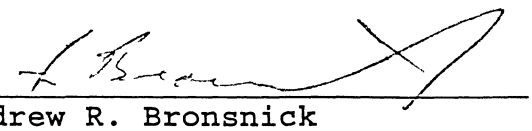
By: 
Andrew R. Bronsnick

Dated: November 16, 1999

CERTIFICATION OF SERVICE

This is to certify that on this 16th day of November, 1999 two true and correct copies of the foregoing Reply Brief of Appellant were sent via Federal Express:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

ANDREW R. BRONSNICK

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